

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JAMES L. HEISTERKAMP)

For Appellant: James L. Heisterkamp, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

John A. Stilwell, Jr.
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of James L. Heisterkamp against a proposed assessment of additional personal income tax in the amount of \$118.00 and penalties in the amount of \$59.00 for the year 1970.

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Appellant timely filed a Form 540 for taxable year 1970 which contained only his name and address, with his signature and the date at the bottom. Respondent sent him a letter on August 3, 1973, stating that the form did not constitute a valid return and demanding that appellant file a properly completed return within thirty days and pay the tax due, plus a 25 percent penalty for late filing. Appellant failed to respond to that letter and, as of the date of this appeal, had not filed a proper return for 1970.

On January 23, 1974, respondent requested that appellant's employer specify the amount of income received by appellant in 1970. The employer provided the information upon the basis of which a proposed deficiency was issued, including two 25 percent penalties. One penalty was imposed pursuant to section 18681, subdivision (a), of the Revenue and Taxation Code for failure to file a return before the due date, and the other was imposed pursuant to section 18682 of that code (as it read in 1970) for failure to file a return upon notice and demand by the Franchise Tax Board.

Appellant protested the assessment. Respondent's denial of the protest resulted in this appeal.

Appellant contends that respondent is inadequately staffed and, thus, cannot insure that all taxes owed by California taxpayers are collected. **Appellant concludes** that this failure to collect **all taxes** due inferentially grants immunity to certain taxpayers, i.e. those who, by one means or another, avoid paying all, or a portion, of their tax liability. Appellant believes this grant of immunity to some individuals is a violation of his constitutional right to equal protection.

Although we doubt that the above circumstances, even if proved, would establish a constitutional violation (see City of Banning v. Desert Outdoor Advertising, Inc., 209 Cal. App. 2d 152 [25 Cal. Rptr. 621]), we do not reach that question. It is a well established policy of this board to refrain from ruling on a constitutional question in an appeal involving a proposed assessment of tax. This

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policy is based upon the board's belief that such questions are entitled to judicial review, and the absence of any specific statutory authority allowing the Franchise Tax Board to obtain such review of an unfavorable decision.

(Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; Appeal of C. Pardee Erdman, Cal. St. Bd. of Equal., Feb. 18, 1970; Appeal of Paul Peringer, Cal. St. Bd. of Equal., Dec. 12, 1972.)

There being no other issue for us to decide, we conclude that respondent's action should be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of James L. Heisterkamp against a proposed assessment of additional personal income tax in the amount of \$118.00 and penalties in the amount of \$59.00 for the year 1970, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of October, 1976, by the State Board of Equalization.

William L. Burnett, Chairman
Robert J. Kelly, Member
Robert J. Kelly, Member
_____, Member
_____, Member

ATTEST: W. W. Semples, Executive Secretary